

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

CHAMBER SUMMONS NO.54 OF 2006

IN

TESTAMENTARY SUIT NO.33 OF 1986

IN

PETITION NO.613 OF 1986

Krishna Arjun Bhoir.

...Plaintiff/Petitioner

vs.

1. Gaurabai Ramchandra Patil & others.

... Defendants

and

1.Laxman R. Patil & others.

...Respondents.

Ms.Rajani Iyer i/b. M/s. Y.Divekar & Co., for Plaintiffs.

Mr.S.R.Mishra, for Respondents.

CORAM: D.K.DESHMUKH, J.

DATED: 28th September, 2006

P.C.:-

1. This is a chamber summons taken out by the original petitioner in Testamentary petition no.613 of 1986. That petition was filed by the petitioner as executor of the Will left behind by the

deceased by name Kanha Barik Mhatre. That petition was disposed of by this Court by order dated 11.2.1993. That order reads as under:

“Called for settlement.

Shri.Navnit Shah instructed by Divekar & Co. for Petitioner.

Shri.H.K.Mody instructed by Chitnis Vaithy & Co. for Caveator.

P.C.: Consent terms tendered. The same is taken on record and marked 'x'.

Caveat allowed to be withdrawn in view of consent terms.

Probate be issued.

Suit disposed of.

No order as to costs.”

Perusal of the above quoted order shows that the caveat was withdrawn by the caveator in that petition because of the consent terms. The consent terms because of which the caveat was withdrawn have been taken on record by the Court. Paragraph (1) of the consent terms reads as under:-

“The parties have settled their disputes as per agreement executed today, copy whereof is annexed and marked as Ex.”A” hereto.”

Paragraph 3 of this consent terms is relevant which reads as under:-

“3. The parties agree that they have no objection

if the probate is granted unmodified by the terms of agreement Ex.”A”. However, the parties agree and undertake to this Hon'ble Court that their rights and obligations would be regulated by the terms of Agreement Ex.”A” hereto and that an order should be sought on the said terms.”

Thus, the probate of the Will was granted by this Court without modifying the Will. But the terms agreed between the parties for withdrawal of caveat were made part of the order of the Court. Perusal of the agreement entered into between the parties which is mentioned in the consent terms shows that the amounts were to be paid by the petitioner to the parties who are mentioned in the agreement. The time when these amounts were to be paid is also mentioned in the agreement. Clause (5) of this agreement deals with the event of parties who are obliged to pay amount commits default in making payment. Clause (5) of the agreement reads as under:-

“The party of the other part hereby agrees to pay the said amount as stated above to the Party of the first part and further agrees to pay interest at the rate of 18% p.a. on such amount which not paid on due date from due date till payment thereof and till that date the said unpaid amount alongwith accrued interest shall constitute a charge over the property mentioned herein. “

Perusal of the above clause shows that it provides for event of party commits default in making payment and it also provides for consequence. The only consequence that ensues from party who is obliged to make the payment committing default in making payment is that the party becomes obliged to pay interest at the rate of 18% per annum on that amount and the amount due constitutes a charge on the property. Admitted position is that the petitioner committed default in making payment of some of the amounts on due date. Therefore, the petitioner became liable to pay interest on the amount as envisaged by Clause 5. Admittedly, the petitioner tendered the amount which was to be paid alongwith the interest thereon calculated as per clause 5 of the agreement. But the persons who are entitled to receive the amount as per the agreement refused to receive the amount because, according to them, since the petitioner committed default in making payment of the amount they have terminated the agreement. The learned Counsel appearing for respondents also submits before me that respondents are not obliged to accept the amount. According to them, as they have terminated the agreement the petitioner has to file a civil suit for enforcing his rights under the agreement. In my opinion, the submission is not well founded. When the parties have entered into an agreement casting obligation on the petitioner to make payment of the amount at certain intervals and the agreement also provides for consequence of the petitioner committing

default in making payment of the amount, because the petitioner commits default, the agreement cannot be terminated. The respondents were free to stipulate in the agreement that in case default is committed the agreement will stand terminated but they have chosen not to adopt that option but they have adopted the option of providing for creation of charge over the property and for payment of interest on the due amount.

2. In my opinion, as according to the respondents the agreement has ceased to exist, it is for the respondents to take necessary steps and to approach the appropriate forum to seek appropriate orders. As the respondents have refused to accept the amount offered by the petitioner and as they are not willing to accept the amount, in my opinion, the following order would meet the ends of justice.:-

(i) The petitioner to deposit the amount mentioned in prayer clause (a) of the chamber summons with the Prothonotary and Senior Master of this Court within a period of two weeks from today with due notice to the respondents.

(ii). In case the respondents apply before the Prothonotary and Senior Master of this Court for withdrawal of the amount within a

period of six months from the date of deposit, the Prothonotary and Senior Master of this Court shall permit them to withdraw the amount.

(iii). On deposit being made immediately the amount shall be invested in fixed deposit in a nationalised bank. In case respondents apply for withdrawal, the amount be paid to them with accruals if any.

(iv). In case the respondents institute proceedings in appropriate Court within a period of six months and secure appropriate orders, the disposal of the amount shall be governed by the order that may be passed by the competent Court.

(v). In case neither the respondents apply for withdrawal of the amount nor Prothonotary and Senior Master of this Court receives any order from the competent Court in relation to the disposal of the amount, the Prothonotary and Senior Master of this Court shall permit the petitioner to withdraw the amount, with accruals.
